No. 18-50610

In the United States Court of Appeals for the Fifth Circuit

FREEDOM FROM RELIGION FOUNDATION, INC.,
Plaintiff / Appellee / Cross-Appellant,

v.

GOVERNOR GREG ABBOTT, CHAIRMAN OF THE STATE PRESERVATION BOARD; ROD WELSH, EXECUTIVE DIRECTOR OF TEXAS STATE PRESERVATION BOARD,
Defendants / Appellants / Cross-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

RESPONSE AND REPLY BRIEF FOR APPELLANTS CROSS-APPELLEES

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Introduction

Defendants have sovereign immunity from FFRF's claim of viewpoint discrimination regarding its faux nativity scene. This settled principle defeats all of FFRF's contentions.

Defendants have immunity from the district court's award of declaratory relief because that relief is purely retrospective. FFRF tries to argue that the declaration is in fact prospective, but to no avail. Indeed, FFRF inadvertently admits that the declaration is trained only on the past. FFRF also tries to argue that immunity does not bar retrospective relief. That position, however, is foreclosed by Supreme Court precedent and is strikingly radical to boot. It would gut Eleventh Amendment immunity and newly subject States to retrospective monetary awards.

Defendants likewise have immunity from the prospective relief FFRF seeks but the district court denied. The narrow exception to sovereign immunity established in *Ex parte Young*, 209 U.S. 123 (1908), allows for prospective relief against state officers only when there is an ongoing violation of federal law. But FFRF failed to prove any ongoing violation. There is no evidence that defendants will violate the First Amendment in the future by excluding FFRF's exhibit on grounds that it is offensive. And this Court should presume that defendants will follow the law. Although that law was contested before the Supreme Court's landmark decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017)—which is why defendants previously told FFRF that they would not display its offensive exhibit—the law is now clear: governments cannot exclude speech on the basis that it is offensive without engaging in viewpoint discrimination.

This Court should reverse the entry of judgment against defendants on FFRF's viewpoint-discrimination claim and affirm the dismissal of all other claims.

Summary of the Argument

FFRF's response to defendants' appeal fails to show how the district court's retrospective declaratory judgment decreeing that defendants violated FFRF's free-speech rights in December 2015 by removing FFRF's faux nativity display from the Capitol overcomes sovereign immunity. FFRF argues that immunity does not bar retrospective declarations, but that argument is foreclosed by precedent. It also argues that the declaration is really prospective, but can do so only by ignoring the words of the declaration, which are purely backwards-looking.

FFRF's cross-appeal fares no better. FFRF's main argument on cross-appeal is that it was entitled to an injunction rather than (or in addition to) a declaratory judgment. But it was entitled to neither form of relief because it failed to remove defendants' immunity by proving an ongoing violation of federal law. Evidence of what defendants would have done pre-*Matal* has no bearing on what they will do now. In any event, even if there were an ongoing violation of federal law, FFRF would not be entitled to an injunction because a prospective declaratory judgment would provide complete relief.

Stepping away from immunity, the district court correctly dismissed FFRF's unbridled discretion claim. To succeed on this claim, FFRF had to satisfy an extraordinarily high burden because its claim is facial and is made in the context of a limited

public forum, not a traditional public forum. It failed to do so. Far from vesting defendants with unbridled discretion, the "public purpose" requirement for displays in the Capitol provides a more than adequate standard.

Argument

I. This Court Should Reverse The District Court's Retrospective Declaratory Judgment Because It Is Barred By Sovereign Immunity.

As defendants explained in their opening brief, the district court's declaratory judgment is barred by sovereign immunity because it is purely retrospective. The State of Texas and its officers acting in their official capacities cannot be haled into federal court without their consent. *See* Br. 9–10 (citing *Alden v. Maine*, 527 U.S. 706, 712–13 (1999); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–02 (1984)). And while the Supreme Court created a narrow exception to sovereign immunity in *Ex parte Young*, that exception is limited to prospective relief that "assur[es] the supremacy of [federal] law," *Green v. Mansour*, 474 U.S. 64, 68 (1985). Retrospective relief, such as the declaratory judgment entered by the district court, is "insufficient to overcome the dictates of the Eleventh Amendment" because it does not "give[] life to the Supremacy Clause." *Id.*

FFRF seeks to save the district court's impermissibly retrospective judgment by arguing that *Ex parte Young* allows for retrospective relief, and by suggesting that the district court's judgment is prospective. Both arguments are meritless: The former ignores the Supreme Court's words, and the latter ignores the district court's words.

A. *Ex parte Young* does not permit retrospective relief.

FFRF makes two arguments that the district court had jurisdiction to enter retrospective relief. It argues that the "Eleventh Amendment only bars a retrospective declaration of a violation of federal law where there is no claimed continuing violation of federal law." FFRF Br. 21 (internal quotation marks omitted). It later argues that the district court had the equivalent of pendent jurisdiction to enter retrospective relief because it "had jurisdiction from the outset to proceed against [defendants]" and to issue prospective relief. *See* FFRF Br. 25–30. These arguments, however, are really one and the same: that a federal court may enter retrospective relief when it has jurisdiction to enter prospective relief due to an ongoing violation of federal law. This argument is foreclosed by Supreme Court precedent.

The Supreme Court has been clear that even when there is an ongoing violation of federal law that supports prospective relief against an officer acting in his official capacity, sovereign immunity still bars retrospective relief. In *Edelman v. Jordan*, for example, the lower court entered a prospective injunction against state officers to stop an ongoing violation of federal law, yet the Supreme Court still held that the lower court's retrospective injunction was barred by sovereign immunity. 415 U.S. 651, 666–69 (1974). As the Supreme Court later explained in *Quern v. Jordan*, "[t]he distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other." 440 U.S. 332, 337 (1979). The reasoning that allows a federal court to enter prospective relief against state officials simply

does not apply to retrospective relief, regardless whether there is an ongoing violation of federal law. *See Green*, 474 U.S. at 68 ("We have refused to extend the reasoning of *Young*, however, to claims for retrospective relief."); *see also Chiz's Motel & Rest., Inc. v. Miss. State Tax Comm'n*, 750 F.2d 1305, 1308 (5th Cir. 1985) (stating that "federal courts remain barred under the eleventh amendment from granting legal or equitable *retroactive* relief").

FFRF mistakenly believes that *Green* supports its position because a retrospective declaration in that case supposedly would have been permitted "but for the mootness of the case." FFRF Br. 21–22. That is not true. The fact that a statutory amendment mooted the claim for prospective relief in that case meant that any declaration was impermissibly retrospective and thus barred by state sovereign immunity. *Green*, 474 U.S. at 67. If the statutory amendment had not occurred, the lower court could have issued *prospective* declaratory relief, but *Edelman* still would have foreclosed retrospective relief. *Id.* at 68. FFRF also mistakenly relies on *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635 (2002) (cited at FFRF Br. 25), to suggest that once a plaintiff makes allegations sufficient to overcome immunity, a federal court takes plenary jurisdiction and can enter whatever relief it chooses without regard for the Eleventh Amendment. *Verizon* says no such thing. *Id.* at 648–49 (holding that litigation against state officials could proceed because plaintiffs had alleged an ongoing violation of federal law and sought prospective relief).

The consequences of accepting FFRF's erroneous legal argument cannot be overstated. Were this Court to hold that immunity does not bar the district court's award of retrospective relief, there would be no principled way to cabin that holding

only to retrospective declarations because retrospective declarations, like all forms of retrospective relief, are not "remedies designed to end" ongoing violations of law. *Green*, 474 U.S. at 68. This would mean that, whenever there is a well-pleaded allegation of an ongoing violation of law and a request for prospective relief, district courts could award *any* type of retrospective relief, including monetary awards. This would quickly vitiate the Eleventh Amendment.

B. The district court's declaration is unambiguously retrospective.

Perhaps inadvertently, FFRF itself admits that the district court's declaration is impermissibly retrospective when it tries to argue the opposite. FFRF argues that the declaration is prospective because defendants can glean "the [un]constitutionality of ongoing conduct" "from a consideration of a state official's similar past conduct." FFRF Br. 23. But this is really just a concession that the declaration looks backwards, focusing entirely on the "state official[s'] . . . past conduct." *Id.* The declaration does not declare FFRF's rights or defendants' obligations in the future—it declares only that defendants violated FFRF's rights in the past when they "removed [FFRF's exhibit] from the Texas Capitol building under the circumstances of this case." ROA.2027.

FFRF therefore misses the point entirely when it argues that a "declaration regarding ongoing and imminent violations of the law has a prospective effect." FFRF Br. 30. Even if that hypothetical declaration would satisfy *Ex parte Young*, the declaration the district court actually entered does not because it regards defendants' past actions only "under the circumstances of this case," ROA.2027; it does *not* regard ongoing and imminent violations. And for good reason. To declare the parties' rights

in the future, the district court would have had to find an ongoing violation of federal law—something the district court never addressed and seemed to believe was not at issue. *See* Dkt. No. 97 at 9 (district court noting that remedying defendants' decision to remove FFRF's display in 2015 was "all I think this lawsuit's about").[1]

The only other argument FFRF makes to dispute the retrospective nature of the district court's declaration is a foray into self-serving psychoanalysis. According to FFRF, defendants' appeal proves that the declaration is prospective because defendants are only concerned about future compliance and so would not have appealed a purely retrospective declaration. *See* FFRF Br. 25 (contending that defendants' argument "is belied by [their] apparent concern about the future" which would require them to "comply with the law as declared by the Court"). This of course ignores defendants' strong interest in appealing a declaration that infringes on the State's sovereign immunity and opens the door to the award of attorneys' fees. But regardless, FFRF's argument lacks merit because it assumes what it seeks to prove: that the district court entered a prospective judgment with which defendants must comply in the future.

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[1] FFRF describes defendants as arguing that "only injunctive relief can satisfy the requirement of prospective relief." FFRF Br. 25. Not so. Defendants do not dispute that declaratory relief *can* be prospective; the problem is that *this* declaration is not prospective. By the same token, not every injunction is prospective and therefore consistent with *Ex parte Young*. *See Edelman*, 415 U.S. at 666–69 (holding that the Eleventh Amendment barred an injunction ordering retroactive benefits); *see, e.g.*, Dkt. No. 97 at 9 (district court stating that "I can't think of a general injunction other than saying, okay, the display was to be for three days. Come December, they get to display it for three days.").

II. This Court Should Reject FFRF's Arguments On Cross-Appeal.

On cross-appeal, FFRF argues that the district court should have entered an injunction, and should not have dismissed its claim that the Capitol display program authorizes state officials to exercise unbridled discretion. The district court, however, correctly declined to enter an injunction or any type of prospective relief and correctly dismissed FFRF's unbridled discretion claim.

A. The district court lacked jurisdiction to grant prospective relief—whether declaratory or injunctive—because there is no ongoing violation of federal law.

The district court lacked jurisdiction under *Ex parte Young* to enter any type of prospective relief against defendants because, despite repeated protestations, *see, e.g.*, FFRF Br. 23 ("Governor Abbott does not dispute that this case involves an ongoing violation of the First Amendment."); FFRF Br. 29 (asserting that the record is "uncontradicted" as to whether a First Amendment violation is "continuous and ongoing"), FFRF failed to establish an ongoing violation of federal law.

FFRF's argument to the contrary mistakenly ignores the Supreme Court's intervening decision in *Matal*, which significantly altered First Amendment jurisprudence and defendants' legal obligations. *See* Wyatt Kozinski, *Our Proudest Boast*, 53 TULSA L. REV. 523, 523 (2018) (noting that *Matal* is "destined to become a landmark case"). Prior to *Matal*, defendants argued that the Board could constitutionally exclude a display that mocked the sincerely held beliefs of millions of Texas citizens. In a limited public forum like the Capitol, the government may impose content-based restrictions on the speech it allows, but not viewpoint-based restrictions. *See Good*

News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001). And while "the distinction between content discrimination and viewpoint discrimination is somewhat imprecise," *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 31 (2d Cir. 2018) (cleaned up), a restriction prohibiting offensive exhibits because they failed to promote a "public purpose," 13 TEX. ADMIN. CODE § 111.13(a)(3), seemed to be on the content-based side of the divide. This was an eminently reasonable position based on the law as it stood at the time—indeed, it was the position that the district court adopted. The district court explicitly held that the Board *could* exclude offensive speech while remaining viewpoint-neutral. ROA.881 (stating that the Board "could have excluded the exhibit on th[e] grounds" that it was offensive).

Matal changed this understanding. As the district court explained, *Matal* "held a prohibition on registration of trademarks offensive to any group, institution, or belief constituted viewpoint discrimination as a matter of law," because "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" ROA.1984 (quoting *Matal*, 137 S. Ct. at 1763). With this "substantial guidance regarding viewpoint discrimination in the context of speech labeled 'offensive,'" *Wandering*, 879 F.3d at 31, the district court recognized that it would be unconstitutional for the Board to exclude FFRF's exhibit from a limited public forum solely because of its offensive nature. ROA.1984.

There is no evidence in the record to suggest that, after *Matal*, defendants and the Board will exclude a display from the Capitol's limited public forum solely because the display is offensive. The two pieces of evidence FFRF identifies to establish an ongoing violation—the explanation for the 2015 removal of the display,

ROA.598–600, and the 2016 letter from the Board, ROA.608–09—both occurred before *Matal*, when defendants were arguing and the district court agreed that the Board could constitutionally exclude offensive displays. With no post-*Matal* evidence, this Court should presume that defendants will follow the law as declared by *Matal*. *See Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam). That presumption is especially fitting here, where defendants affirmatively demonstrated their commitment to upholding the First Amendment rights of all citizens by inviting "FFRF to submit an application to celebrate the anniversary of the ratification of the Bill of Rights and the Winter Solstice." ROA.609. *See also* ROA.599 (noting that the Board welcomes exhibits with "a secular message in an effort to educate the public about nonreligious viewpoints.").[2]

With no post-*Matal* evidence that defendants will exclude an FFRF exhibit because it is offensive to the people of Texas, FFRF failed to prove an ongoing violation of law with which to overcome state sovereign immunity.

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[2] FFRF attempts to sidestep the lack of evidence of any ongoing violation by arguing that defendants are "foreclosed from even arguing [] this point . . . as an appellant abandons issues not raised in its initial brief on appeal." FFRF Br. 29. This is twice wrong. First, it is wrong because Eleventh Amendment immunity is a jurisdictional issue that can be raised at any time. *See Edelman*, 415 U.S. at 677–78 (court of appeals did not err in considering sovereign immunity even though it was not argued before the district court). Second, it is wrong because the lack of an ongoing violation is an issue on cross-appeal—not defendants' appeal, which turns on the retrospective nature of the relief awarded.

B. Even if there were an ongoing violation of federal law, the district court did not abuse its discretion when it declined to issue an injunction.

Because there is no ongoing violation of federal law, defendants retained immunity from any relief, including an injunction prohibiting defendants "from excluding Plaintiff's Exhibit from the Texas State Capitol in the future." FFRF Br. 33. But even if FFRF had demonstrated an ongoing violation, the district court did not abuse its discretion in declining to enter an injunction. *See Ball v. LeBlanc*, 792 F.3d 584, 598 (5th Cir. 2015) ("This court reviews permanent injunctions for abuse of discretion.").

Injunctive relief is an "extraordinary" remedy. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). It is an especially extraordinary remedy against state officials because they are presumed to act in good faith and follow the law as declared by the courts, which means that a declaration against them is the "functional equivalent" of an injunction. *Miers*, 542 F.3d at 911; *cf. Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.) ("declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as [an] injunction . . . since it must be presumed that federal officers will adhere to the law as declared by the court"). Prospective declaratory relief is sufficient to afford complete relief to a plaintiff who prevails on the merits against the government.

FFRF only disputes the sufficiency of a declaratory judgment because it takes this appeal as evidence that defendants will not comply with a declaratory judgment. But nothing could be further from the truth. While defendants strongly contend that

the district court entered an impermissibly retrospective declaration and lacked jurisdiction to enter a prospective declaration, they will, as always, comply with a lawful declaration. There is no basis to impose the extraordinary and coercive remedy of injunctive relief.

C. The district court did not err in dismissing FFRF's unbridled discretion claim.

In addition to its claim that defendants engaged in viewpoint discrimination, FFRF brought a facial challenge to the regulations governing the Capitol display program because these regulations purportedly vest defendants and the Board more generally with unbridled discretion. FFRF Br. 34–39. The district court correctly dismissed this claim.[3]

"The Supreme Court has long held that the government violates the First Amendment when it gives a public official unbounded discretion to decide which speakers may access a traditional public forum." *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006). Unbridled discretion is inconsistent with the First Amendment because it risks two specific harms. The first is the potential for "self-censorship by speakers" who seek to "avoid being denied a license to speak." *City of Lakewood v. Plain Pealer Publ'g Co.*, 486 U.S. 750,

[3] Although FFRF states that its unbridled discretion claim is both "facial and as applied," FFRF Br. 37, "only a facial challenge can effectively test the statute" for unbridled discretion. *City of Lakewood*, 486 U.S. at 758; *see also Children First Found., Inc. v. Fiala*, 790 F.3d 328, 343 (2d Cir. 2015) (stating that "consistent with every prior application of the unbridled discretion doctrine of which we are aware, [plaintiff's] challenge . . . is properly construed as a facial challenge"), *opinion withdrawn and superseded on reh'g in part*, 611 F. App'x 741 (2d Cir. 2015).

759 (1988). The second is "the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.*; *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) ("A government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view." (internal quotation marks omitted)).

Establishing an unbridled discretion claim is difficult because "[f]acial invalidation is, manifestly, strong medicine, that [should be used] sparingly and only as a last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (internal quotation marks omitted). The plaintiff "must demonstrate a substantial risk" that the challenged provisions will lead to a First Amendment violation, *id.*, which means here that FFRF must demonstrate a substantial risk that the provisions either lead to self-censorship or preclude courts from determining whether a decision by the Board denying an application for the Capitol display program violated the First Amendment.

This is a heavy burden in the context of a claim that an official has unbridled discretion to prohibit speech in a public forum—the only type of forum to which the Supreme Court has applied this doctrine—because "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Regulations need only provide "adequate standards to guide the official's decision." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). It is an exceptionally heavy burden outside of the traditional-public-forum context because a government official's discretion must be

understood "in light of the characteristic nature and function of that forum." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 94–95 (1st Cir. 2004) (internal quotation marks and citation omitted); *see also Child Evangelism*, 457 F.3d at 387 (holding that "unbridled discretion analysis" is not "precisely the same when a limited public forum or nonpublic forum, rather than a traditional public forum, is involved"). Unlike a public forum, which must be content-neutral, *see Perry Educators Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45–46 (1983), a limited public forum "does not allow persons to engage in every type of [speech]," but rather reserves the forum "for certain groups or speech." *Good News*, 533 U.S. at 106. This means that officials charged with operating a limited public forum must have latitude to administer the necessarily imprecise border between speech for which the forum is open and that for which it is closed.

As the district court rightly concluded, FFRF failed to satisfy its weighty burden of proving that the Capitol display program's content restriction vests defendants and the Board with unbridled discretion. ROA.884–86. The relevant regulations require that a proposed display "must be for a public purpose," 13 TEX. ADMIN. CODE § 111.13(c)(2), and then expressly define "public purpose" as:

> The promotion of the public health, education, safety, morals, general welfare, security, and prosperity of all of the inhabitants or residents within the state, the sovereign powers of which are exercised to promote such public purpose or public business. The chief test of what constitutes a public purpose is that the public generally must have a direct interest in the purpose and the community at large is to be benefitted.

Id. § 111.13(a)(3). While written broadly to encompass a very large swath of speech, this "public purpose" definition provides a workable and testable standard. As the district court put it, the definition "provides the Board a reasonable framework with which to accept or deny exhibit applications in the limited forum context." ROA.886.[4]

FFRF nevertheless argues that this full-paragraph definition leaves defendants and the Board with unbridled discretion because the Executive Director has stated that this requirement is "fairly broad and subject to interpretation." FFRF Br. 38. But the fact that the definition is broad and allows a significant range of speech is a point in its favor, not a knock against it. Nor is it a problem that the standard is subject to interpretation. "Perfect clarity" is not necessary even in public forums where restrictions must be narrowly tailored and serve a compelling interest. *Ward*, 491 U.S. at 794. It is even less necessary where the content-based restriction challenged as affording too much discretion need only be "reasonable in light of the purpose served by the forum." *Good News*, 533 U.S. at 107.

A provision allowing for different interpretations becomes a constitutional problem only when it creates a substantial risk of self-censorship or of making as-applied challenges next to impossible. *See Moore v. Brown*, 868 F.3d 398, 405 (5th Cir. 2017)

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[4] Even without a written definition, the phrase "public purpose" has sufficient content to provide judicially manageable standards. *Cf. Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) (asking in context of takings claim whether a use restriction on real property is "reasonably necessary to the effectuation of a substantial public purpose"); *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (noting in the context of a Contracts Clause claim that "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation").

(per curiam) (noting that "a plaintiff may bring a facial unbridled discretion challenge" only if it "demonstrate[s]" that the challenged provision creates one of these risks). FFRF has never asserted that the "public purpose" requirement encourages self-censorship. Nor does it have any basis to argue that the definition is a surreptitious means "of suppressing a particular point of view." *Forsyth County*, 505 U.S. at 130. Far from cloaking the Board's decisions and precluding as-applied challenges, the "public purpose" definition is the basis for FFRF's successful argument in the district court that defendants engaged in viewpoint discrimination. *See* FFRF Br. 38 (arguing that FFRF's display fits within "public purpose" definition). Indeed, the Board specifically told FFRF in a written letter how it was interpreting the "public purpose" requirement and thus why, under the law at the time, it would deny FFRF's application. *See* ROA.608–09. *Cf. Forsyth County*, 505 U.S. at 133 (finding ordinance unconstitutional where there were "no articulated standards" and there was no "explanation for [the official's] decision").

That the Board has not excluded any other exhibits for lack of a public purpose—other than exhibits that fall within specific exclusions—also does not support FFRF's argument. Rather than demonstrating arbitrary and capricious discrimination, this record of accepting all but one display definitively establishes that officials have consistently applied the regulations to permit a wide range of speech. *Forsyth County*, 505 U.S. at 131 ("In evaluating respondent's facial challenge, we must consider the county's . . . own implementation and interpretation of [the challenged ordinance]."). Even if there were the potential for abuse, that abuse "must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting

upon a degree of rigidity that is found in few legal arrangements." *Thomas*, 534 U.S. at 325.

Conclusion

The Court should reverse the district court's judgment on FFRF's viewpoint-discrimination claim on which it was granted declaratory relief, and affirm the dismissal of FFRF's unbridled discretion claim.

Respectfully submitted.

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Certificate of Service

On March 25, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ *Andrew B. Davis*
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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,511 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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